Postal Regulatory Commission
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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR EXCEPTIONAL CIRCUMSTANCES	Docket No. R2013-11R

REPLY COMMENT OF THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Pursuant to the Commission's June 12, 2015 notice and order in the above case ("June 12 Order"), the National Association of Letter Carriers, AFL-CIO ("NALC") hereby submits this reply comment.

I. USPS HAS TAKEN THE APPROPRIATE APPROACH TO RE-CALCULATING, WITHOUT THE "COUNT ONCE" RULE, THE COMMISSION'S ESTIMATE OF VOLUME LOSS DUE TO THE GREAT RECESSION

In its June 24 initial comment, NALC explained that postal expert Dr. Michael Crew had reviewed and deemed sound USPS's methodology for re-calculating, without the "count once" rule, the Commission's estimate of volume loss due to the Great Recession. *See* NALC Initial Comment at 1-2. In their June 26 initial comments, the Greeting Card Association and National Postal Policy Council (together, "GCA") and Valpak Direct Marketing Systems, Inc. ("Valpak") argue that USPS's re-calculation methodology overestimates USPS's volume loss, by counting pieces lost to the Great Recession in full in subsequent years. *See* GCA Initial Comment at 6-10 (criticizing USPS's so-called "count every piece every year" approach); Valpak Initial Comment at 11-16. GCA argues that pieces lost one year cannot necessarily be counted as lost in subsequent years because the cause of their loss may cease, at some point, to be from the Great Recession. *See* GCA Initial Comment at 9. Valpak argues that in determining how many times to count a lost piece as lost, the Commission ought to take into account USPS's adjustment to the loss. *See* Valpak Initial Comment at 15-16.

The core flaw in both GCA's and Valpak's criticisms is that the Commission's "new normal" analysis *already* determines at what point lost pieces can no longer be counted as lost due to the Great Recession. Indeed, that is why the Court of Appeals struck down the Commission's "count once" rule; it was not only artificial but also unnecessary. *See Alliance of Nonprofit Mailers, et al. v. Postal Regulatory Comm'n*, Case No. 14-1009 (D.C. Cir. June 5, 2015), slip op. 16 (explaining that the "count once" rule makes no sense because the "new normal" analysis "identif[ies] a stopping point for the recession's exigent impact on lost mail volume"). Because the "new normal" analysis fixes the point up to which USPS may count lost pieces as lost, there is no merit to GCA's and Valpak's assertions that some earlier end point must be identified. Indeed, Valpak's argument that USPS should only be permitted to count lost pieces as lost until the point it could adjust to the loss was precisely one of the rationales advanced by the Commission – and rejected by the Court – for the "count once" rule. *See id.*, slip op. at 16. The Court of Appeals found no sense to having a separate yardstick for measuring when USPS can adjust to lost pieces, and thus stop counting pieces as lost, when the "new normal" framework defines just that. *See id.*, slip op. at 16.

II. USPS HAS TAKEN THE APPROPRIATE APPROACH TO RE-CALCULATING, WITHOUT THE "COUNT ONCE" RULE, THE LOST CONTRIBUTION DUE TO THE GREAT RECESSION

In its June 8 motion, USPS concluded that the increase in lost volume due to the removal of the "count once" rule from the Commission's analysis translates into a loss of contribution that increases from $2.766 billion to $3.957 billion. *See* USPS Motion at 6. In its June 26 initial comment, the Association for Postal Commerce ("Postcom") argues that USPS overstates the contribution loss, which it claims should only be $2.826 billion, barely more than the contribution loss *with* the "count once" rule. *See* Postcom Initial Comment at 7-8. In particular, Postcom argues that USPS erred by multiplying each year's increased volume loss by the per-piece unit contribution rate for 2014, rather than multiplying each year's increased loss by the per-piece unit contribution rate for that year. *See* Postcom Initial Comment at 3-8.

Postcom acknowledges, *see* Postcom Initial Comment at 6, that the Commission in its order granting the exigent price increase used the same methodology as USPS uses now. *See Order Granting Exigent Price Increase*, Order No. 1926, Docket No. R2013-1 (Dec. 24, 2013), at 105 ("The Commission uses the framework proposed by the Postal Service"). If Postcom believed, as it now claims, that the Commission's methodology was wrong, it should have challenged that aspect of the Commission's order. Postcom gives no indication that it ever raised such a challenge. Postcom thus waived its right to raise the argument at this very late stage of the exigent price request proceedings.

In any event, Postcom's proposed approach is flawed. As Dr. Crew explains, the per-piece contribution rate for any given year is determined, in part, by the price of postage that year. Because USPS operates under the price cap regime, it cannot raise prices above the price cap to respond to exigent events as they occur, but must seek relief from the Commission retroactively, and such relief is awarded years after the fact. Thus, the contribution rate for, say, 2010, reflects the capped prices that USPS actually charged, not what it would have charged had it been able, at the time, to respond to the exigency. The proper measure for relief must include what USPS *would have charged* in 2010 if at the time it had been free to raise rates in response to the exigent circumstances. Using the 2010 per-piece contribution rate, which was based on the capped 2010 prices, thus understates the relief USPS is due. The judgment of the Commission and USPS to use the 2014 per-piece contribution rate is a more reasonable attempt to approximate the contribution that USPS would have earned had it been free, at the time, to apply an exigent price increase

To support its position, Postcom relies on cases involving economic damages caused by a defendant to a plaintiff in a lawsuit, such as a patent infringement case, and argues that damages must be determined year by year. *See* Postcom Initial Comment at 4 & n.3. Such cases, where the loss flows endogenously from the actions of the parties, are inapplicable to the situation here; USPS's losses flow from an exogenous event – the Great Recession – that was entirely out of its (and the Commission's) control.

In any event, Postcom's insistence that USPS's losses must be determined year by year, *see* Postcom Initial Comment at 4 n.3, misses the point. There is no dispute that USPS's losses must be determined for each year; the question is what per-piece contribution rate to apply to each year's volume losses. As explained above, using the contribution rate that USPS actually experienced during the given year, based on capped prices it was constrained to charge at the time, understates USPS's economic loss.

III. IN THIS REMAND PROCEEDING, THE COMMISSION SHOULD RECONSIDER ITS "NEW NORMAL" ANALYSIS, SINCE THAT ANALYSIS UNDERESTIMATES USPS'S LOSSES FROM THE GREAT RECESSION

In its initial comment, NALC urged the Commission to reconsider its "new normal" analysis in these remand proceedings since the "new normal" analysis underestimates USPS's actual losses from the Great Recession. *See* NALC initial comment at 2-4. Although Postcom's initial comment counsels the Commission against reopening consideration of the "new normal" analysis, Postcom acknowledges, as it must, that nothing in the Appeals Court decision precludes such reconsideration. *See* Postcom Initial Comment at 11. Indeed, as Postcom concedes, "an agency is normally permitted to consider any issue on remand." *Id.* at 10-11.

Valpak argues that the Commission should refrain from re-visiting the "new normal" analysis because the Appeals Court "explicitly endorsed it." Valpak Initial Comment 8. In fact, the Court held only that the Commission's "new normal" analysis fell "within the permissible bounds of reason." *Alliance of Nonprofit Mailers*, slip op. at 12 ("The only question before us is whether the Commission's use of the 'new normal' to measure causal effect falls within the permissible bounds of reason … We hold that it does"). The court's holding that the "new normal" analysis falls within minimum bounds of reason is a far cry from holding that it accurately measured the extent of USPS's losses from the Great Recession. Because there is no dispute that the Commission has the authority on remand to reconsider its "new normal" analysis, *see id.* at 17 n.3, and because doing so would allow it to avoid understating USPS's true losses, it should reconsider its "new normal" framework.

IV. USPS's MUCH NEEDED AND RELATIVELY MODEST CAPITAL EXPENDITURES IN NO WAY SHOW THAT USPS NO LONGER NEEDS THE RELIEF PROVIDED BY THE SURCHARGE REVENUE

Finally, Postcom points to USPS's 2015 capital spending of $2.2 billion, primarily on buildings, equipment and vehicles, as a sign that USPS's financial position is so improved that USPS may not "need[ ] any further surcharge revenue today." Postcom Initial Comment 13-14. Postcom asserts that "[a]n enterprise that is in liquidity crisis, or expects to return to one, does not make long-term commitments of this kind." *Id*. at 14. In fact, given the size of USPS's overall revenue, capital spending of $2.2 billion is very modest. Postcom makes no showing that, measured as a percentage of revenue, USPS's 2015 capital spending is any greater than that of its competitors.

Over the past several years the exigent circumstances at issue in this case and the Congressional mandate to massively pre-fund decades of future retiree health benefit costs have combined to starve USPS of much needed investment to maintain and upgrade its networks. Indeed, the USPS has been forced to use 100% of its borrowing authority to make payments into the Postal Service Retiree Health Benefits Fund rather than invest in new vehicles or adequately maintain/upgrade its infrastructure. USPS *needs* to make capital expenditures, to avoid its plants, equipment and vehicles from falling into a state of disrepair or obsolescence. The level of capital spending proves nothing more than USPS's determination to keep its operations going, in order to meet its universal service obligation.

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Respectfully submitted,

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